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No. 95-1565

Supreme Court, U.S.
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IN THE

Supreme Court of the United States

OCTOBER TERM, 1995

DONALD CARSON,

Petitioner,

versus

WATERFRONT COMMISSION OF NEW YORK HARBOR,

Respondent.

ON A PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

BRIEF FOR RESPONDENT WATERFRONT COMMISSION OF NEW YORK HARBOR IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI

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STATEMENT OF THE CASE

A. The Respondent Waterfront Commission of New York Harbor (Commission) and its Powers

The Commission is a body corporate and politic and an instrumentality of the States of New Jersey and New York (New Jersey Laws of 1953, c.202 (N.J.S.A. 32:23-1 and following); New York Laws of 1953, c. 882 (McK. Unconsol. Laws §9801 and following), approved by Congress of the United States (Public Law 252, c.407, 83rd. Cong. 1st. Sess.)) created for the purpose of eliminating racketeering, and other criminal, corrupt and evil conditions on the waterfront in the Port of New York District.

To combat the various waterfront evils, the Commission is empowered to, among other things, register longshoremen (N.J.S.A. 32:23-27), checkers (N.J.S.A. 32:23-105) and telecommunications system controllers (N.J.S.A. 32:23-105.1) and license pier superintendents and hiring agents (N.J.S.A. 32:23-12), stevedores (N.J.S.A. 32:23-19) and port watchmen (N.J.S.A. 32:23-39).

The Commission is vested with authority by N.J.S.A. 32:23-80; N.J.S.A. 32:23-80.2 (WCA §8) to remove any "officer, agent or employee" of a waterfront labor organization described in N.J.S.A. 32:23-80 or of "a welfare fund or trust administered partially or entirely by such labor organization" if that person "has been *convicted* by a court of the United States, or any State or territory thereof, of treason, murder, manslaughter or any felony, high misdemeanor or misdemeanor involving moral turpitude, or any crime or offense enumerated in *** [N.J.S.A. 32:23-105]." (Emphasis added).

N.J.S.A. 32:23-80 and 80.2 comprise Section 8 and Section 8-b of the Waterfront Commission Act. New York's counterpart

of WCA §8 is substantially similar and is contained in McK. Unconsol. Laws §9933.

In substance, N.J.S.A. 32:23-80 prohibits the collection of dues by a waterfront labor union as long as the "convicted" union officer, agent or employee remains in office. N.J.S.A. 32:23-80.2 contains a direct prohibition against the "convicted" individual from remaining in office and a prohibition against the labor organization, welfare fund or trust from knowingly permitting the "convicted" person to "assume or hold any office, agency or employment." N.J.S.A. 32:23-80.2 also empowers the Commission to enforce WCA §8 by an appropriate civil action. A violation of WCA §8 is also a misdemeanor punishable by a fine of $500.00 or imprisonment for one year, or both. N.J.S.A. 32:23-80, 80.2.

B. The petitioner Donald Carson (Carson)

Up until late April 1988, Carson was an Executive Vice President of the International Longshoremen's Association (ILA), a General Organizer of the Atlantic Court District, ILA, Secretary-Treasurer and Business Agent of Local 1588, ILA and a Trustee of various joint labor-management funds. On April 16, 1988, a jury returned a verdict against Carson in the United States District Court of New Jersey of one count of racketeering conspiracy in violation of 18 U.S.C. §1962(d) and one count of extortion conspiracy in violation of 18 U.S.C. §1951 and 18 U.S.C. §2.

C. The Instant Controversy

In a letter dated April 18, 1988, Gerald P. Lally, the Commission's General Counsel, on behalf of the Commission, advised John Bowers, the ILA's President, that in view of Carson's convictions, he (Carson) was in violation of WCA §8 and, accordingly, should be removed immediately from all union and trust-fund positions. By letter dated April 19, 1988, Bowers, on

behalf of the ILA, forwarded a copy of Lally's letter to Carson, noted the prohibitions contained in WCA §8, as well as in 29 U.S.C. §504 and suspended Carson from the union positions. In a subsequent letter dated April 29, 1988, Bowers, on behalf of the ILA, informed Carson that he (Bowers) was advised by the Commission that a suspension of a convicted officer does not satisfy WCA §8 and therefore Carson is "removed from all offices of the ILA and its affiliates and all fringe benefit funds." Carson's conviction was subsequently vacated, but not on the merits. *U.S.* v. *Carson,* 969 F. 2d 1480 (3rd. Cir. 1992).

D. Proceedings Below

Carson instituted suit in the United States District Court for the District of New Jersey against the Commission, Lally, the three ILA union entities and Bowers. Reduced to its essentials, Carson's complaint alleged that he was wrongfully deprived of escrow benefits conferred by 29 U.S.C. §504(d), in that he was prematurely removed by the Commission from union office by the Commission shortly after the return against him of a jury verdict of guilty on felony charges in the District Court of New Jersey. Carson maintained that the Commission improperly acted prior to the entry of a judgment of conviction within the meaning of 29 U.S.C. 504(c)(l). Lally was sued in his individual capacity.

A motion to dismiss pursuant to Rule 12(b)(6) of the Federal Rules of Civil Procedure was made by the Commission and Lally as well as the other defendants. The application of the Commission and Lally was granted and Carson's complaint against them was dismissed by the District Court. The District Court ruled that Lally enjoyed qualified immunity. Carson's action against the remaining defendants was administratively terminated (Carson Appendix, pp. 31-46). (Carson had been restrained from proceeding against these defendants by Order of the United States District Court for the Southern District of

New York entered in *United States* v. *Local 1804-1. et als.*, Docket No. 90 Civ. 0963 (JSM).)

Upon Carson's appeal as to the Commission only, the Third Circuit unanimously affirmed the New Jersey District Court's Order of Dismissal (Carson Appendix, pp. 1-31). Carson did not appeal the District Court's Order of Dismissal in respect to Lally and no claim concerning Lally is raised by Carson in the instant Petition.

REASONS FOR DENYING THE WRIT

The Waterfront Commission Compact and WCA §8 were expressly approved by Congress in 1953. Carson argues at pp. 23-26 of his Petition that Congress improperly signed a legislative "blank check" when it gave its consent to the Waterfront Commission Compact "and enactments in furtherance thereof." The very foundation of this argument is flawed in that WCA §8 had already been enacted by New Jersey and New York and was before Congress in 1953. Moreover, Congressional authorization of future State enactments to an interstate compact is not unique to the Waterfront Commission Compact. *See Courtesy Sandwich Shop. Inc.* v. *Port of New York Authority,* 12 N.Y. 2d 379, 391, 240 N.Y.S. 2d 1, 7 (1963), appeal dismissed, 375 U.S. 78, 84 S. Ct. 194 (1963), rehearing denied, 375 U.S. 960, 84 S. Ct. 440 (1963).

As stated by this Court in *De Veau* v. *Braisted,* 363 U.S. 144, 80 S. Ct. 1146 (1960):

> *** Although § 8 *** was *** not formally submitted as part of the compact to Congress, in giving its approval to the compact Congress explicitly gave its authority to such supplementary legislation in accord with the objectives of the compact by providing in the clause granting

> consent "[t]hat the consent of Congress is hereby given to the compact set forth * * * and to the carrying out and effectuation of said compact, and enactments in furtherance thereof."
>
> In giving this authorization Congress was fully mindful of the specific provisions of § 8. Not only had § 8 already been enacted by the States as part of the Waterfront Commission Acts when the compact was submitted to Congress, but, in the hearings held before the House Committee on the Judiciary, it was specifically urged by counsel for the International Longshoremen's Association, as a ground of opposition to congressional consent, that approval of the compact by Congress would carry with it sanction of § 8. See Hearing before Sub-committee No. 3 of the Committee on the Judiciary, House of Representatives, 83d Cong., 1st Sess., on H.R.6286, H.R.6321, H.R.6343, and S.2383, p. 136.
>
> (363 U.S. at 150-151; 80 S. Ct. at 1150)

This Court in *De Veau* expressly rejected a contention that WCA § 8 was preempted by 29 USC § 504(a):

> Appellant, however, argues that any state disablement from holding union office on account of a prior felony conviction, such as § 8, which has terms at variance with § 504(a), is impliedly barred by it. Just the opposite conclusion is indicated by the 1959 Act, which reflects Congressional awareness of the problems of preemption in the area of labor legislation, and which did not leave the solution of questions of pre-emption to inference. When Congress meant pre-emption to flow from the 1959 Act it expressly so provided.

Sections 205(c) and 403, set out in the margin, are express provisions excluding the operation of state law, supplementing provisions for new federal regulation. No such pre-emption provision was provided in connection with § 504(a). That alone is sufficient reason for not deciding that § 504(a) pre-empts § 8 of the Waterfront Commission Act. In addition, two sections of the 1959 Act, both relevant in this case, affirmatively preserve the operation of state laws.

That § 504(a) was not to restrict state criminal law enforcement regarding the felonies there enumerated as federal bars to union office is provided by § 604 of the 1959 Act: "Nothing in this Act shall be construed to impair or diminish the authority of any State to enact and enforce general criminal laws with respect to [the same group of serious felonies, with the exception of exclusively federal violations, which are listed in § 504(a)]." And to make the matter conclusive, § 603(a) is an express disclaimer of pre-emption of state laws regulating the responsibilities of union officials, except where such preemption is expressly provided in the 1959 Act. Section 603(a) provides: "Except as explicitly provided to the contrary, nothing in this Act shall reduce or limit the responsibilities of any labor organization or any officer, agent, shop steward, or other representative of a labor organization * * * under the laws of any State * * *." In view of this explicit and elaborate treatment of pre-emption in the 1959 Act, no inference can possibly arise that § 8 is impliedly pre-empted by § 504(a).

(363 U.S. at 156-157, 80 S. Ct. 1152-1153)

See also *Brown* v. *Hotel & Restaurant Employees & Bartenders*, 468 U.S. 491, 104 S. Ct. 3179 (1984).

Approximately two decades after *De Veau* dispatched arguments that WCA § 8 was preempted by 29 U.S.C. § 504, proceedings were instituted by various criminally convicted waterfront union officials in State and Federal Courts in New York and New Jersey wherein they advanced claims that the Commission's attempts to invoke the provisions of WCA §8 against them, upon their convictions at the trial court level, were preempted by 29 U.S.C. § 504(c). At that time (prior to 1984) 29 U.S.C. § 504(c) defined conviction as of the "date of the judgment of the trial court or the date of the final sustaining of such judgment on appeal, whichever is the later event." Under 29 U.S.C. § 504(c) prior to its 1984 amendment, both a convicted union official who was eventually exonerated on appeal and a convicted union official whose guilt was upheld on appeal could remain in office until the appeals were exhausted. The Commission claimed that WCA § 8 required removal of waterfront union officials upon conviction at the trial court level and notwithstanding the pendency of any appeals.

The Commission's position was uniformly upheld. Thus, State and Federal Courts in both New Jersey and New York have squarely held that an individual is convicted within the meaning of that term contained in WCA §8 *at the time a jury verdict is rendered against that individual or when that person enters a guilty plea to a charge.* In *Local 1804, Longshore. Ass'n* v. *Waterfront Commission*, 171 N.J. Super. 508 (App. Div. 1979), aff'd., 85 N.J. 606 (1981), New Jersey's Appellate Division was asked "to determine whether the disqualification to hold office because of a conviction of a crime provided by §8 of the Waterfront Commission Act, N.J.S.A. 32:23-80 and N.J.S.A. 33:23-80.2 occurs upon conviction in the trial court or only after affirmance on appeal." The Appellate Division unquestionably held:

New Jersey courts have consistently held that a "conviction" occurs at the trial level when the court accepts a guilty plea or a jury returns a verdict of guilty. *State* v. *Compton*, 28 N.J. Super. 45, 48 (App. Div. 1953); *State* v. *Rios*, 155 N.J. Super. 11, 15 (Law Div. 1977). In distinguishing the terms "conviction" and "sentence," the court in *State* v. *Henson*, 66 N.J.L. (37 Vroom) 601 (E. & A. 1901), noted:

> The ordinary legal meaning of "conviction," when used to designate a particular state of a prosecution triable by a jury, is the confession of the accused, in open court, or the verdict returned against him by the jury, which ascertains and publishes the fact of his guilt [at 607, quoting *Commonwealth* v. *Lockwood*, 109 Mass. 323 (1872)]

It is therefore clear that the Legislature, in prohibiting those "convicted" of certain crimes from holding union office, intended to include all those against them a verdict of guilt has been returned, notwithstanding their appeal from conviction.

***When a union official has been found guilty of one of the crimes enumerated in §8, he forfeits his right to the trust and confidence of the membership.

*** it is evident the Legislature intended that a union official forfeit his office immediately upon a conviction at trial and not allow him to hold office during what may be lengthy appellate proceedings.

(171 N.J. Super. at 511 - 513)

In addition, the Appellate Division refused to be guided by 29 U.S.C. §504. The New Jersey Supreme Court, in affirming the determination of the Appellate Division, squarely held that LMRDA §504 (29 U.S.C. §504) does not pre-empt the interpretation of WCA §8 that "convicted" in WCA §8 means upon conviction in the trial court. Said the New Jersey Supreme Court at 613-614:

> Removing criminal elements from the waterfront in New York and New Jersey is a peculiarly local problem in which each state has a compelling interest. *De Veau, supra,* 363 U.S. at 154, 80 S.Ct. at 1151. That conclusion, recognized by both Congress and the United States Supreme Court, weighs heavily against preemption. In addition, congressional willingness to tolerate some interference with LMRDA is manifest from the unique consent clause in the Waterfront Commission compact and the specific disclaimers of preemption contained in LMRDA §§ 603 (a) and 604. Id. at 156, 80 S.Ct. at 1152. In *De Veau* Justice Frankfurter described LMRDA § 603(a) as "an express disclaimer of pre-emption of state laws regulating the responsibilities of union officials...." Id. at 157, 80 S.Ct. at 1153.
>
> *More important, in giving its consent to the compact, Congress did not merely remain silent regarding supplementary legislation such as section 8. As indicated above, Congress formally consented to state supplementary legislation, a consent which Justice Frankfurter found "to be unique in the history of compacts."* Id. at 154, 80 S.Ct. at 1151. In addition, in determining the extent to which Congress was willing to accept the sanctions of section 8, it is enlightening to

recall that the ILA voiced objections during congressional subcommittee hearings that section 8 unduly interfered with federal labor policy. Notwithstanding that contention, *Congress expressly consented to the enactment of implementing legislation not part of the compact such as section 8.* Id. at 151, 80 S.Ct. at 1150. In light of this Court's finding in *Hazleton* v. *Murray, supra,* that the presence of criminal elements in waterfront labor organizations prevented free collective bargaining, it would be ironic as well as inconsistent to hold that the disqualification from office of a labor official convicted of a high misdemeanor contravenes federal labor policy. Judge Sofaer of the Southern District of New York reached the same result, stating:

> In light of the special circumstances presented by waterfront union corruption, and given Congress' unique response approving the Compact with its enabling clause, it seems clear that Congress would tolerate if not command WCA § 8's requirement that union officers resign or be removed before appeals are final, even though it is a departure from the federal rule. [495 F. Supp. at 1124-1125].
>
> (Emphasis added)

The identical issue was raised in *Scotto* v. *Waterfront Comm'n. of N.Y. Harbor*, (Sup. Ct., Sept. 19, 1980), aff'd o.b., 78 A.D. 2d 686, 434 N.Y.S. 2d. 1004 (App. Div. 1980), lv. to appeal denied, 50 N.Y. 2d. 709, 434 N.Y.S.2d 1025 (1980). In

that case, Justice Scholnick of the Kings County Supreme Court concluded in an exhaustive opinion *:

> 1. The term "convicted" as it appears in Section 8 of the Waterfront Commission Act (McK. Unconsolidated Laws, §9933), is to be construed in accordance with the meaning of "conviction" under New York Law, and not Federal Law, namely, upon the entry of a plea of guilty or *upon the return of a verdict of guilty at the trial court level, and not after exhaustion of all appeals.*

The Court also held that this interpretation is not "offensive to our national labor policy." Slip opinion at p.44.

Moreover, the Second Circuit in *International Longshoremen's Association* v. *Waterfront Commission*, 642 F.2d 666 (2d. Cir. 1981), *cert.* den. 454 U.S. 966, 102 S. Ct. 509 (1981), clearly announced with respect to the meaning of the term conviction in WCA §8:

> Plaintiffs' remaining arguments were rejected by the district court for reasons with which we are in substantial accord. The district court correctly predicted that, when the New York courts were asked to determine when a "conviction" occurs under the statute, they would hold that it occurs when there is a guilty plea or verdict, not, as plaintiffs urge, when all appeals are exhausted. See *Scotto* v. *Waterfront Commission*, No. 5580/80 (Sup. Ct. Sept. 19, 1980), aff'd, 78 A.D. 2d 686, 434 N.Y.S. 2d 1004 (App. Div. 2d Dep't. 1980), leave to appeal denied, 51 N.Y. 2d 709, 434 N.Y.S. 2d__, 415 N.E. 2d 984 (1980). The district court did not err in adopting the

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* Copies of this Opinion have been lodged with the Clerk's Office.

> definition it believed that New York courts would apply. The definitions of "conviction" under New York law and section 504(c) of the Labor-Management Reporting and Disclosure Act are not so incompatible as to require a finding of federal preemption. See *De Veau* v. *Braisted, supra*, 363 U.S. at 154-57, 80 S. Ct. at 1151-53; *Cloverleaf Butter Co.* v. *Patterson*, 315 U.S. 148, 156, 62 S. Ct. 491, 495, 86 L. Ed. 754 (1942); *Fitzgerald* v. *Catherwood*, 388 F. 2d 400, 402-06 (2d Cir.), *cert. denied*, 391 U.S. 934, 88 S. Ct. 1846, 20 L. Ed 2d 854 (1968).
>
> (642 F.2d at 671)

See also the Southern District of New York's opinion in *International Longshoremen's Association* v. *Waterfront Commission*, 495 F. Supp. 1101, 1114-1117 (S.D.N.Y. 1980).

Against this formidable backdrop of precedent, two days after a jury returned a guilty verdict against Carson in the United States District Court for the District of New Jersey in April 1988, the Commission, by its General Counsel, sent letters to Carson and the involved waterfront unions advising that Carson's continuance in office was in violation of WCA § 8. Carson's claim that he was *singled out* for WCA § 8 removal prior to sentencing is belied by the fact that in 1988 the Commission had the benefit of the *Local 1804* and *Scotto* cases, as well as the determination of the Second Circuit in *International Longshoremen's Association* v. *Waterfront Commission.* See pp. 7-11 above. Those cases, which predated the 1988 WCA § 8 removal of Carson by many years, as noted, uniformly held that "conviction" under WCA § 8 occurs upon the entry of a plea of guilty or upon the return of a guilty verdict at the trial court level.

Moreover, Carson's argument that his removal from union office shortly after the return of the jury verdict unlawfully

deprived him of 1984 enacted 29 U.S.C. § 504(d) escrow benefits is seriously flawed on several grounds.

First, it must be emphasized that there could be no wrongful interference with any rights established by 29 U.S.C. §504(d) since no rights *ever* inured to Carson under that provision. Thus, 29 U.S.C. 504(d) provides in relevant part:

> "Whenever any person
>
> (1) *by operation of this section. has been barred from office or other position in a labor organization as a result of a conviction*, and
>
> (2) has filed an appeal of that conviction,
>
> any salary which would be otherwise due such person by virtue of such office or position, shall be placed in escrow by the individual employer or organization responsible for payment of such salary. ***"
>
> (Emphasis added)

Clearly Carson was barred from his positions in the waterfront unions *solely* by virtue of WCA §8. Since this bar did not arise "by operation of" 29 U.S.C. §504, no escrow obligation ever arose under 29 U.S.C. §504(d) or will arise thereunder. It is therefore difficult to fathom how the Commission's advising the unions of the requirements of WCA § 8 at the proper time interfered with any purported obligation on behalf of these unions to escrow. In addition, since the Commission was not Carson's individual employer, "or the organization responsible for the payment of *** [his] salary," the Commission was not required to establish any escrow fund for him.

Even if the Commission's letters and the resulting discharge of Carson from union office by the ILA's President somehow prevented or interfered with the triggering of the 29 U.S.C. § 504(d) escrow, the Commission did nothing more than

lawfully comply with WCA § 8. WCA § 8 is no more preempted by the 29 U.S.C. § 504(d) escrow provision than it (WCA § 8) had been by 29 U.S.C. § 504 prior to its 1984 amendment. See *International Longshoremen's Association* v. *Waterfront Commission, supra.*

Thus, as stated by the Third Circuit in this case, the 1984 amendment to § 504 establishing the escrow did not give Carson, who was later "exonerated", any greater rights than he would have had prior to the 1984 amendment:

> Carson's argument that the escrow provision added by the 1984 amendment to § 504 demonstrates a special congressional concern with "mitigat[ing] the harm of a wrongful conviction" is fatally flawed at its inception. As the district court's discussion implied, the post-1984 version of 29 U.S.C. § 504 expressed no more of a congressional intent "to mitigate the harm of a wrongful conviction" than did the pre-1984 version. On the contrary, convicted union officials are in fact worse off after the 1984 amendment.
>
> ***
>
> Far from representing the significant beneficial change in the rights of wrongfully convicted officials that Carson would have us ascribe to it, the escrow requirement added by the 1984 amendment simply maintains the status quo. Convicted-but-exonerated officials, both before and after 1984, are entitled to receive their wages during the pendency of their appeals. But viewed as a whole, the 1984 amendment contained two serious drawbacks for convicted union officials: (1) non-exonerated officials no longer are entitled to their wages during appeal; and (2) exonerated officials, although entitled to wages during the

> pendency of their appeals, are not permitted to work during that time. Accordingly, Carson's claim that Congress' 1984 amendment to § 504 evinces a special concern with "mitigat[ing] the harm of a wrongful conviction" is inaccurate.
>
> (73 F. 3rd at 27-28)

Relying on *De Veau*, the Third Circuit reconfirmed that WCA § 8 is not preempted by 29 U.S.C. § 504:

> The *ratio decidendi* of the *De Veau* plurality's decision is that § 8 and § 504(a) are compatible precisely because they both are aimed at removing criminal elements from union office; any friction between the two is constitutionally permissible because § 504 lacks specific preemption language. We understand *De Veau*, therefore, to reject a "facial" challenge to any and all claimed inconsistencies between § 8 of the WCA and § 504 of the LMRDA. Standing alone, this would appear to mandate an affirmance since no preemption language has been added to section 504 since *De Veau* was decided.*
>
> * * *
>
> Finally, we observe that in 1984 the Supreme Court specifically reaffirmed *De Veau's* basic premise that the LMDRA expressed a clear congressional intent not to preempt state regulation of union officials. *Brown v. Hotel & Restaurant Employees & Bartenders Int'l Union Local 54,*

* Congress was indeed aware of the judicial construction of the term "convicted" as contained in WCA § 8. See the statement of Nicholas Scoppetta, Waterfront Commissioner, before the Senate Subcom. on Investigations at pp. 325-326 (February 18, 1981).

> 468 U.S. 491, 506, 104 S. Ct. 3179, 3188 (1984) ("[Section] 504 itself makes clear that Congress did not seek to impose a uniform federal standard on those who may serve as union officials."). Although *Brown* dealt with a claim that New Jersey's regulation of unions in the casino industry conflicted with the NLRA, much of the *Brown* Court's analysis was devoted to comparing New Jersey's regulatory scheme to the New York version of § 8 of the WCA scrutinized in *De Veau*. In the process, *Brown* reaffirmed *De Veau's* refusal to find § 8 preempted by federal labor policy. Since *De Veau* controls, we conclude that Congress' refusal to add any specific preemption language to § 504 since *De Veau* was decided compels an affirmance.
>
> (73 F. 3rd at 29-30)

In view of the foregoing, it is clear that *De Veau* remains valid law. The 1984 amendment to 29 U.S.C. § 504 has not preempted WCA § 8. Even if WCA § 8 is deemed federal law (Carson Petition, pp. 27-29), it has not in any way been repealed by necessary implication by the 1984 amendment to 29 U.S.C. 504, *Rodriguez* v. *U.S.*, 480 U.S. 523, 107 S. Ct. 1391, 1392 (1987).

CONCLUSION

For the foregoing reasons, the respondent Waterfront Commission of New York Harbor prays that the Petition for a writ of certiorari to review the judgment and decision of the United States Court of Appeals for the Third Circuit in this case be denied.

Dated: April 18, 1996

Respectfully submitted,

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